ORIGINAL

No. S172199

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FORD GREENE,
Plaintiff and Appellant,
vs.

MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT,
Defendant and Respondent,

FRIENDS OF CORTE MADERA CREEK WATERSHED AND FLOOD MITIGATION LEAGUE OF ROSS VALLEY,

Intervenors and Respondents.

Review of Decision of the Court of Appeal for the First Appellate District
(Case No. A120228)

Superior Court for the County of Marin
The Honorable M. Lynn Duryee, Judge Presiding
(Marin County Superior Court Case No. CV 073767)

REPLY BRIEF ON THE MERITS OF DEFENDANT AND RESPONDENT MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

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I. INTRODUCTION

The Answer Brief ("Answer") contends article II, § 7's[1] requirement that "[v]oting shall be secret" applies to a property-owner election on a property related fee under article XIII D, § 6(c). He urges this Court to overturn the election at issue without evidence secrecy was infringed. This brief demonstrates this Court should affirm the trial court's rejection of this election challenge for four reasons.

First, article XIII D, like earlier public finance law, distinguishes between secret registered-voter elections, and non-secret property-owner elections in which transparency is necessary to confirm the right to vote and to determine the weights of votes.

Second, Greene cites post-election commentaries that do not discuss secrecy or suggest Proposition 218 prohibits non-secret, property owner voting. These commentaries are of limited utility in discerning the intent of Proposition 218, which was adopted before they were written.

Third, there is no dispute that review of the legal issues is *de novo* or that factual issues are subject to substantial evidence review. However, the District denies Greene's claim the independent judgment standard of review applies to the few facts disputed here.

Finally, no competent record evidence demonstrates the District failed to maintain secrecy or that any lapse in secrecy affected the election outcome.

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[1] Unspecified references to articles and sections are to Articles XIII C and XIII D of the California Constitution.

II. ARGUMENT

A. PROPOSITION 218 RESPECTS THE LONG-STANDING DISTINCTION BETWEEN SECRET, REGISTERED-VOTER ELECTIONS AND NON-SECRET, PROPERTY-OWNER ELECTIONS

California has long distinguished between secret, registered-elections and non-secret, property-owner elections to allow credible recounts of weighted property owner voting and to ensure ballots are cast only by those entitled to vote. There is no support in the text, context, or legislative history of Proposition 218 for Greene's claim the voters who adopted it intended to change this practice.

For example, in *Southern Cal. Rapid Transit Dist. v. Bolen* (1992) 1 Cal.4th 654, this Court considered whether limiting franchise on a transit assessment to property owners who pay that assessment violated Equal Protection. This Court found that the right to vote was not fundamental in elections held by a special-purpose government entity assigned limited functions affecting property owners distinctly. (*Id.* at 669).

Bolen rejected the assertion that property-owner voting on a transit assessment violated California Constitution, article I, § 22, which states: "The right to vote or hold office may not be conditioned by a property qualification."

> We have long since construed article I, § 22 to "'refer to the qualification of electors entitling them to vote at the ordinary elections, local and general, held in the course of the usual functions of civil government.' [Citation.]" (*Tarpey v. McClure* (1923) 190 Cal. 593, 606, 213 P. 983 [water storage district]; see also *Wheeler v. Herbert* (1907) 152 Cal. 224, 232, 92 P. 353; *Potter v. Santa Barbara* (1911) 160 Cal. 349, 355, 116 P. 1101 [road improvement district]; *Martinelli v.*

> *Morrow* (1916) 172 Cal. 472, 473, 156 P. 1017 [comparable constitutional provision applies to political subdivisions exercising "governmental functions," not to "limited purpose" government such as municipal water district].) Nothing in the record or the arguments of the parties in this case persuades us that we should revisit these holdings.

(*Id.* at 679, n. 10).

Not About Water v. Board of Supervisors (2002) 95 Cal.App.4th 982, *rev'd on other grounds by Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, rejected a challenge to weighted property-owner assessment ballots required by Proposition 218. Following *Bolen*, the Court of Appeal found no violation of the "one person, one vote" rule, finding the assessment district was not a general governmental entity subject to constitutional rules for registered-voter elections. (*Id.* at 999).

Further support is provided by *Alden v. Superior Court (Tabb)* (1963) 212 Cal.App.2d 764. *Alden* challenged a property-owner election to form a water district, claiming the non-secret ballots violated what is now article II, § 7 (at 770-71):

> The constitutional provisions which govern elections held in the ordinary course of civil government do not control such formation elections. In *Tarpey v. McClure* [(1923) 190 Cal. 593, 606, 213 P. 983], *supra*, the Supreme Court upheld the constitutionality of the Water Storage District Act of 1921, which provided for a formation election in which only property owners were entitled to vote, and each voter was given one vote for each $100 worth of his land. The court said (p. 606):

> "The act does not violate section 24 of article I, or section 1 of article II, in that it denies to any but land owners the right to vote at district elections. ... However, it is now clear, in the light of the later decisions, that those provisions of the constitution 'refer to the qualification of electors entitling them to vote at the ordinary elections, local and general, held in the course of the usual functions of civil government.' [Citations.] 'By this and like provisions, the legislature is not dealing with elections, with suffrage, or with the ballot, within the meaning of the constitution and the election laws of the state. The formation of this and similar districts is a function pertaining purely to the legislative branch of the government. Wherefore it may do so by giving such persons as it may think best an opportunity to be heard.' (*Potter v. County of Santa Barbara*, 160 Cal. 349, 355 [116 P. 1101, 1103].) ...This disposes also of the contention that the act violates section 5, article II, of the constitution, providing for the secrecy of the ballot." (*Accord: Barber v. Galloway*, 195 Cal. 1, 11 [231 P. 34].) [abridgements by *Alden* court.][2]

Thus, property-owner elections involving limited-purpose government entities and revenue measures to fund services to property are exempt from constitutional provisions for registered-voter elections involving general-purpose governments, including ballot secrecy.

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[2] *Alden* also concluded that ballot secrecy was actually afforded given the absence of contrary allegations or evidence. 212 Cal.App.2d at 771. The same is true here.

Proposition 218 must be understood against this legal backdrop. It provides distinct approval processes for taxes, assessments and fees. General and special taxes are submitted to registered voters. Article XIII C, § 2. Only property owners may cast non-secret, weighted assessment protest ballots under article XIII D, § 4. Under article XIII D, § 6(c); "at the option of the agency," property related fees may be approved by two-thirds of registered voters or a majority of property owners. Section 6(c) expressly authorizes local rules for such elections "similar to those for increases in assessments," which, as noted in the Opening Brief (at pages 30-34) involve non-secret, weighted ballots of property owners. Thus, Proposition 218 is not at variance with the *Tarpey* line of authorities and ought to be interpreted to preserve it.

The Court of Appeal here distinguished the *Tarpey* line of cases for two reasons. First, *Tarpey* was decided long before the articulation of the one-person-one-vote requirement in the 1960s and the exception for landowner voting [3] and reasoned that property-owner voting was exempt from constitutional requirements for registered-voter elections because the Legislature need not have allowed voting in these contexts at all. The Court of Appeal here noted that voting on assessments and property related fees is now mandated by article XIII D, making such elections subject to such procedures as the Constitution requires. Slip Op. at 19. Second, the Court concluded Proposition 218 worked a significant break in public finance law, making this line of cases irrelevant. *Id.* at 19-20.

These points are not persuasive. It is not enough to say finance law precedents require reexamination in light of Proposition 218. If the voters who approved Proposition 218 intended to allow non-secret property-owner voting, such voting may continue. The Court of Appeal below assumed

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[3] *Sayler Land Co. v. Tulare Lake Water Basin District* (1973) 410 U.S. 719.

intent to compel secrecy, but does not persuasively demonstrate that intent. That the voters who approved Proposition 218 **could** have set aside *Tarpey* is no proof they **did** so.

It is reasonable to interpret Proposition 218 to maintain public finance law which it does not change – including non-secret, weighted property-owner voting on measures imposed to fund services of primary benefit to property.

On a related point, Greene cites legislative history of the Omnibus Implementation Act to argue the statue somehow requires secret fee elections despite its admitted silence as to fees.[4] (Answer at 53). However, the cited legislative history discusses secret **assessment** ballots, not fee ballots under article XIII D, section 6(c).

Moreover, the cited legislative history predicts subsequent legislation adopting language of Government Code § 53753(c), enacted in 2000, and § 53753 (e)(1), enacted in 2001, making assessment ballots secret until tallied and disclosable thereafter. That compromise addressed two concerns expressed in the cited legislative history – protecting property owners from coercion in the casting of their votes (via temporary secrecy) but holding local governments accountable by allowing public examination of ballots once counted.

In any event, that assessment ballots are disclosed once tallied **supports** the view that secrecy is not required for property-owner voting under article XIII D, section 6(c) because that section grants local agencies

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[4] There has been extensive litigation of the fee provisions of Proposition 218. See Opening Brief, n.3. The legislative history Greene cites shows negotiations which led to unanimous adoption of the Omnibus Implementation Act. From these facts, it can be surmised that the statute is silent as to fees because the negotiators preferred to litigate than to compromise these issues. If so, construing the statute's silence as to fees as treating property-owner fee elections as registered-voter elections under Elections Code § 4000 disserves that intent.

authority to fashion rules for fee elections "similar to" the non-secret procedures required for assessments.

B. THE POST-ADOPTION COMMENTARIES GREENE CITES DO NOT UNDERMINE THE DISTRICT'S CONSTRUCTION OF PROPOSITION 218

To support his contention property-owner elections under article XIII D, § 6(c) are subject to ballot secrecy, Greene cites an analysis of the Howard Jarvis Taxpayers Association (HJTA) dated January 1997 – after Proposition 218's adoption. (Answer at 59, citing Greene's Request for Judicial Notice ("RJN"), Ex. 6a at 17). That commentary is advocacy, not evidence of the intent of voters who acted two months earlier. This Court has held "[a]n after-the-fact declaration of intent by a drafter of a proposition ... may deserve some consideration ... but by no means does it govern our determination how the voters understood the ambiguous provisions." *Carman v. Alvord* (1982) 31 Cal.3d 318, 331 fn. 1; see also, *Stanton v. Panish* (1980) 28 Cal.3d 107, 114.

> The general rule is that, in determining legislative intent, the views of individual drafters are not considered as grounds upon which to construe a statute. There is no necessary correlation between what the drafter understood the text to mean and what the voters enacting the measure understood it to mean. An exception has sometimes been made where the drafters' views were clearly and prominently communicated to the legislators at the time the measure was being considered for enactment, on the theory that there was reason to believe that the other legislators were influenced in their view of the bill by the drafters' communicated views, but the exception has been largely confined to a setting in the

> Legislature where a limited number of legislators may clearly be expected to be so influenced. The exception is also clearly confined to views expressed while the measure was being considered, and does not concern expressions of individual motivation made after the fact.

C-Y Development Co. v. City of Redlands (1982) 137 Cal.App.3d 926, 932-33 (citations omitted).

Thus, the 1997 HJTA commentary neither reveals voters' understanding when they adopted Proposition 218 two months earlier nor demonstrates property-owner elections under article XIII, § 6(c) are subject to article II, § 7.[5] Moreover, nothing in the HJTA post-election commentary discusses secrecy or suggests non-secret, weighted property-owner elections under article XIII D, § 6(c) are forbidden. Greene's RJN, Ex. 6a.

Further, the portion of the HJTA commentary Greene quotes annotates article XIII D, § 6(a)'s provisions regarding majority protest proceedings on property related fees. It does not comment on § 6(c)'s separate requirement for a property-owner election (Answer at 59, citing Greene's RJN, Ex. 6a at 17). Greene's reliance on discussion of § 6(a) to construe § 6(c) is misplaced.

Greene also claims the League of California Cities' Proposition 218 Implementation Guide ("League Guide") demonstrates that "none of the issues the District raises as to secrecy in section 4 assessment majority protests apply to section 6 elections." (Answer at 57). Although the League Guide reflects the considered views of respected public lawyers, it does not bind this Court or any other.

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[5] The District's Opening Brief (at 34-37) cites an earlier draft of the HJTA annotation given at least some circulation during the campaign on Proposition 218. While the pre-election annotation is hardly conclusive as the meaning of the measure, it bears greater consideration that the *post hoc* exegesis.

Moreover, in the paragraph following the material Greene quotes, the League Guide acknowledges a one-parcel-one-vote standard (as the excerpt Greene quotes suggests is required) may violate equal protection in some settings:

> Given the 'one parcel, one vote' system for property owner elections on fees and charges, one may imaging scenarios where the election procedure could violate the equal protection rights of property owners. For example, numerous small parcels under common ownership would receive many votes while a larger undivided parcel would have only one vote. If the fee is based upon square footage of property, one might argue that the rights of the large property owner are harmed. Inasmuch as common charges such as water, sewer and refuse collection are apportioned based on use, this issue may be limited to fees that are apportioned according to characteristics of property.

League of California Cities' Proposition 218 Implementation Guide (2007 ed.) at 68). [6]

Thus, the League Guide cites no authority for the claim that one-parcel-one-vote is the rule for property-owner voting under article XIII D, § 6(c) and concedes this interpretation may offend equal protection on some facts. However, article XIII D, § 6(c)'s authorizes local rules for voting on property related fees "similar to" those required by § 4 for assessments. Such rules can allow weighted voting, fractional voting (as where spouses express different views on a fee on community property) and other arrangements that resolve this equal protection problem and "enhance taxpayer consent."

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[6] Pages 67-68 of the League Guide are attached to this brief pursuant to California Rule of Court 8.520(h).

C. *SILICON VALLEY'S* INDEPENDENT JUDGMENT STANDARD IS INAPPLICABLE HERE

Under *Gooch v. Hendrix* (1993) 5 Cal.4th 266, questions of law in election contests are determined *de novo* on appeal and factual issues are reviewed under the substantial evidence standard. Neither appellate nor trial courts may overturn voters' decision absent substantial evidence election defects actually affected the outcome. *Id.* at 274-277; 284-285; *see also, Wilks v. Mouton* (1986) 42 Cal.3d 400, 404. Greene does not dispute these standards of review. (Answer at 19-22).

Greene, however, contends this Court should apply the independent judgment standard of review articulated in *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 (*Silicon Valley*). There, this Court concluded article XIII D, § 4 requires:

> that courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218.

Id. at 448.

Greene ignores *Silicon Valley*'s analysis, which turns on Article XIII D, § 4's provisions regarding the special benefit needed to justify assessments and whether assessments are spread in proportion to that benefit. Rather, he construes the case as an invitation to apply independent judicial review, wholesale, to all factual disputes in Proposition 218 cases.

However, *Silicon Valley* applies independent judgment review to quasi-legislative factual determinations on assessments. Its reasoning has no application to ordinary facts regarding a disputed election. *Silicon Valley* is not an invitation for courts to treat the outcomes of elections less

deferentially than the rules of our democracy have long required. Rather, Proposition 218 is intended to "enhance taxpayer consent" and is no charge to shift decision-making authority from voters to judges.

D. THERE IS NO RECORD EVIDENCE THAT SECRECY WAS NOT PROTECTED AND, THEREFORE, NO JUSTIFICATION TO OVERTURN THE PROPERTY OWNERS' DECISION

Greene makes no response to the District's argument the Court of Appeal mistakenly concluded the District had a duty to inform voters ballots would be secret and that the Court could overturn the election due to a failure in that duty. As demonstrated by the Opening Brief (at 61-63) there is no authority for that conclusion; the Elections Code's Bill of Voter's Rights provides otherwise.

Nor does Greene cite any record evidence the District failed to protect ballot secrecy or to inform property owners it would do so, or that any alleged failure of secrecy sufficiently affected the outcome to justify overturning it.

First, contrary to Greene's contention (Answer at 4, citing 8 pages of trial court oral argument), there was no stipulation to try this case on the face of the ballot and the pleadings. Greene sought to present evidence on two issues: "the usual voter disqualification rate in elections in the County of Marin" (RT[7] at 8:2-3) and "how specifically ... the form of the ballot was arrived at." (RT at 8:15-16). He also stated that, given time, he might think of other relevant issues bearing proof. (RT at 10:5-8).

Judge Duryee stated that these facts were immaterial and the case turned on the undisputed form of ballot and the legal implications of that

[7] "RT" refers to the Reporter's Transcript of Proceedings on Appeal of September 7, 2007 and October 15, 2007.

ballot. (RT at 10:9:2-3, 10:17-20). Counsel for the District (RT at 10:14-16) and for Intervenors (RT 10:27 to 11:1) agreed. Judge Duryee then determined not to take evidence, but to invite briefing. (RT at 11:28 to 12:2.)

Greene presses two factual claims: (i) the typical rate at which votes are disqualified in Marin County elections is 1% and (ii) he recounted the disqualified ballots and, if counted, they would have defeated the fee. He provides no basis for this Court to find – for the first time on appeal – either fact.

First, as to the disqualification rate, Greene cites only an allegation stated on information and belief. (Answer at 61, citing Appellant's Appendix ("AA") at 3). The District denied this allegation (AA at 119, lines 8-10), and Judge Duryee found no need to decide it. (AA at 276-77 (statement of decision); RT at 11:28 to 12:2 (declining to take evidence). Thus, no competent evidence supports finding this fact for the first time in this Court.

Even if the disqualification rate were unusually high, that can easily be explained by voters' unfamiliarity with property-owner voting newly required by Proposition 218. Disqualification of ballots submitted by those who did not follow plainly stated rules is not evidence the District failed to afford the secrecy its rules promised or that any such failure affected the outcome. Rather, it suggests the District protected the right of property owners to determine this election, by discounting ballots not shown to have been cast by property owners.

Voter identification requirements are essential to the integrity of elections and disqualification of unsigned absentee ballots is required by law. Elections Code § 3011; *see, e.g., Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1023-1024; *Stebbins v. Gonzales* (1992) 3 Cal.App.4th 1138, 1141-1142. As Judge Duryee wrote:

> [I]nvalidating the mailed ballots that were not signed was necessary to further the government's compelling interest in preventing voter fraud and preserving the integrity of the election process. (*See, e.g., Young v. Gnoss* (1972) 7 Cal.3d 18, 22-23.)

AA at 277.

We turn next to Greene's so-called "recount." First, the Answer cites only allegations of the Complaint on this point, as well. Answer at 3 (citing AA at 13, 84, 97-112). Appendix page 13 alleges Green conducted a "recount," citing Exhibits 15 and 16 to the Complaint. Exhibit 15 appears at pages 93-96 and is Greene's recount demand. Exhibit 16 appears at pages 97 to 112 and consists of 9 pages of hash marks, 3 handwritten pages purporting to total and authenticate Greene's "recount" and 3 pages of unexplained calculator tapes. Unsurprisingly, the District denied these allegations in its Answer, noting:

> The inherent unreliability of Elector's count is underscored on the face of the Elector's complaint where the total number of alleged invalidated ballots (i.e., 1648) is an amount different from the alleged sum total of "yes" (i.e., 736) and "no" (i.e., 942) votes."

AA at 120. Intervenors also objected to this "evidence:"

> These statements lack proper foundation. Greene improperly attempts to offer the contents of writings, i.e., unsigned ballots. If the content of a writing is in issue, either the original writing or admissible secondary evidence must be produced. Oral testimony is inadmissible to prove the content of a writing. Evid. C. §§ 1520-1523.

> Greene's statements are inadmissible hearsay. He attempts to offer out of court statements for the truth of the matter asserted, i.e., the ballots cast each set forth a specific vote. Evid. C. § 1200(b). Greene, an avowed opponent of the Storm Drainage Fee, offers no evidence that an exception to the hearsay rule exists. His statements also do not indicate the trustworthiness or reliability of the evidence. *People v. Ayala* (2000) 23 Cal.4th 225, 268 ("The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree.") Although Greene indicates two county officials were present, these individuals did not tabulate the results – Greene did."

AA at 277.

Greene made no response to these objections in the trial court (AA at 235-244) other than to acknowledge a mathematical error (AA at 242, n.5). RT at 16:19 to 21:22 (oral argument). The District restated its objections orally. RT at 23:21 to 26 ("that's all speculation, ... that contention lacks foundation. We have no actual count of what the votes would have been like. There was no official count.")

Judge Duryee did not expressly rule on these issues, finding the content of invalidated ballots immaterial because they had been properly invalidated. AA at 277.

Thus, the "evidence" of a recount Greene offers is meaningless and there is no competent evidence before this Court that the disqualified ballots, if counted, would have changed the outcome.

It is, of course, Greene's burden to provide an adequate record on appeal and this Court may disregard claimed facts unsupported by the record. *See Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1.

Prevention of fraud is a compelling government interest which justifies election rules such as the signature requirement here. *Young v. Gnoss* (1972) 12, 22-23; *Eu v. San Francisco County Democratic Central Comm.* (1989) 489 U.S. 214, 231 ("A State indisputably has a compelling interesting in preserving the integrity of its election process. Indeed, "the right to express one's choice of a candidate at the polls is not unrestricted. It is subject to reasonable regulation in the interest of secrecy and uniformity of the ballot and the fairness of the vote, etc." *McFarland v. Spengler* (1926) 199 Cal. 147, 152; *see also Livingston v. Heydon* (1972) 27 Cal.App.3d 672 (upholding invalidation of ballots where indication of preferred candidate was placed outside designated voting square). Of course, it bears noting that Proposition 218 itself requires assessment protest ballots to be signed by property owners (article XIII D, § 4(d)) and Elections Code § 3011 requires envelopes containing absentee ballots to be signed, as well.

However, should this Court conclude that secret ballots are required in property related fee elections among property owners under article XIII D, § 6(c), and be unpersuaded to find that secrecy was actually afforded (as demonstrated by the Opening Brief at 60-61, 64), the District respectfully requests that the Court remand this case to the trial court so it may prove that it actually afforded secrecy. Should this Court determine that a recount of the disqualified ballots is required; the District respectfully submits that this, too, is a proper subject for remand.

III. CONCLUSION

Accordingly, the District urges this Court to affirm the trial court and uphold the election imposing a fee to fund programs to protect Ross Valley property owners from floods.

DATED: October 28, 2009

Respectfully submitted,
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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 4,072 words, as counted by the Word version 2007 word-processing software program used to generate the brief.

DATED: October 28 , 2009

Respectfully submitted,
COLANTUONO & LEVIN, PC

By: _____
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DISTRICT

service at that address. Notice of an *increase* in a fee or charge may be given by including it in the agency's regular billing statement for the fee or charge or in any other mailing to the address to which the agency customarily mails the billing statement for the fee or charge. However, if the agency desires to preserve any authority it may have to record or enforce a lien on the parcel to which the service is provided, the agency must also mail notice to the record owner's address shown on the last equalized assessment role (if different than the billing or service address).

One written protest per parcel whether filed by one of several owners or tenants of the parcel shall be counted in calculating a majority protest.

AB 1260 (Caballero) does not change the definition of "record owner" found in Section 53750(j). In fact it does not address who gets notice. The record owner continues to receive notice. The legislature is simply providing that the required notice may be mailed to the same address where the service is already billed. If an agency wishes to use AB 1260 (Caballero) , it is best not to state who is getting the notice, and in fact address it to both the owner and tenant. If the property tax rolls provide a different address for the owner of the parcel receiving the property-related service, the agency undertakes some risk if it fails to send the Section 6 notice to the "record owner" as defined by Section 53750(j). AB 1260 (Caballero) intentionally does not solve the problem of whether tenants are required to receive notice since some public lawyers believe that such a legislative clarification would not be constitutional unless limited to the conclusion that only record owners are required to receive notice because the Legislature has no power to rewrite Proposition 218. Because AB 1260 (Caballero) does not change the definition of "record owner," the debate will most likely continue between those who believe notice must be given to the "record owner" as defined in Section 53750(j) even if a tenant is receiving and paying for the service and those who believe the "record owner" is the tenant for purposes of the notice and protest provisions of Section 6(a).

It should be noted that public lawyers on both sides of this debate agree that nothing in Proposition 218 prevents or prohibits an agency from giving notice to tenants in addition to the "record owner."

Property-Related Fee Elections

New or increased fees and charges subject to Proposition 218, except for sewer, water and refuse collection services, must receive voter-approval. *See* Cal. Const., art. XIIID, § 6(c). The election must be conducted not less than 45 days after the public hearing. Cal. Const., art. XIIID, § 6(c).

> *Practice Tip: Public agencies may wish to evaluate including escalators and maximum fee amounts in ordinances presented for voter approval. This approach will obviate the need to go back to the voters as long as the public agency keeps its fee amounts below voter-approved maximum rates or in accordance with voter-approved escalator provisions. See Gov. Code, § 53739.*

Proposition 218 does not specify procedures for the conduct of property related fees and charges elections. However, the agency may adopt procedures that are similar to those required for

assessments. An all mail ballot election is authorized by Elections Code section 4000(c)(9). Cal. Const.,, art. XIIID, § 6(c); Cal. Const.,, art. XIIID, § 4.

At the option of the agency, the voters in the election may be either the property owners (requiring majority vote approval); or the electorate residing in the affected area (requiring two-thirds voter approval). Cal. Const.,, art. XIIID, § 6(c).

There is one ballot per parcel if an agency uses a property owner vote. Cal. Const.,, art. XIIID, § 4(d). The voters are the "owners of the property subject to the fee . . ." Cal. Const.,, art. XIIID, § 6(c).

Unlike the assessment procedure, there is no authority or requirement to weight the ballots according to the financial obligation of the affected property. *Compare* Cal. Const.,, art. XIIID, § 4(e) ("In tabulating the ballots, the ballots shall be weighted according to the proportional financial obligation of the affected property.") *with* Cal. Const.,, art. XIIID, § 6(c) (requiring a majority vote of the property owners of the property subject to the fee or charge).

Given the "one parcel, one vote" system for property owner elections on fees and charges, one may imagine scenarios where the election procedure could violate the equal protection rights of property owners. For example, numerous small parcels under common ownership would receive many votes while a larger undivided parcel would have only one vote. If the fee is based upon square footage of property, one might argue that the rights of the large property owner are harmed. Inasmuch as common charges such as water, sewer and refuse collection are apportioned based on use, this issue may be limited to fees that are apportioned according to characteristics of property.

Application of the Voting Rights Act of 1965 to Proposition 218 Elections

Congress enacted the Voting Rights Act of 1965, 42 U.S.C. § 1973, and following, under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination. The Voting Rights Act contains generally applicable voting rights protections, but it also places special restrictions on voting activity within designated, or "covered," jurisdictions. Jurisdictions—states or political subdivisions— are selected for coverage if they meet specified criteria suggesting the presence of voting discrimination in the jurisdiction. The Act subjects covered jurisdictions to special restrictions on their voting laws. Section 203 requires preparation of multi-lingual election materials. Section 5 of the Act requires pre-approval ("pre-clearance") from the U.S. Department of Justice for any measure that departs from the voting scheme in place in the jurisdiction on a specified date. Federal pre-clearance is required "whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968." 42 U.S.C. § 1973c.

Section 5's review of changes in voting procedures is intended to prevent changes that disadvantage racial or ethnic minorities. In *Lopez v. Monterey County,* 525 U.S. 266 (1999), the United States Supreme Court held that pre-clearance was required for consolidation of Monterey's trial courts even though that change implemented a change required by state law. Arguably Proposition 218 is likewise a change in state law that implements a change in certain

PROOF OF SERVICE
Ford Green v. Marin County Flood Control District, et al.
Supreme Court Case No. S172199

I, Kimberly Nielsen, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 9007. On October 29, 2009, I served the document(s) described as REPLY **BRIEF ON THE MERITS OF DEFENDANT AND RESPONDENT MARIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT** on the interested parties in this action as follows:

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Hon. Lynn Duryee
Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

**Hand delivered to:

Supreme Court of the State of California
- LA Office
350 McAllister Street
San Francisco, CA 94102
(Original + 13 copies)

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Avenue, Suite 2700, Los Angeles, California 90071 with delivery fees fully provided for.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 29, 2009, at Los Angeles, California.

Kimberly Nielsen